Central Law Journal.

ST. LOUIS, MO., APRIL 11, 1902.

OPERATION OF THE TORRENS IDEA OF LAND REGISTRATION IN THE UNITED STATES.—A casual glance at the table of contents of this issue will be sufficient evidence of a special effort on our part to present to our readers a clear idea of the present operation of the Torrens System of land registration in the United States. Renewed interest in this scheme seems to be reviving all over the country and the old prejudice which met it on its first arrival on our shores is being rapidly dissipated in the clearer knowledge of what it is, in the vigorous opinions of the courts sustaining its constitutionality, and above all, in its successful operation in the states of Massachusetts and Illinois. Letters have reached us from legislators and lawyers of different states seeking earnestly for information and advice, the latest and most earnest appeal coming from the state of Texas, a state which has undoubtedly taken more interest than any other state, with the probable exception of Massachusetts, in effectually quieting the title to lands within its jurisdiction.

We have had the suggestion made to us that the lawyers of the country would be found strenuously opposed to the introduction of this system in this country on grounds of self-interest. We could not for a moment entertain such a base and unwarrantable suspicion of a profession which, throughout its long and glorious record, both in England and in this country, has ever been foremost in promoting the public weal, many times in direct opposition to its own pecuniary and professional aggrandizement. Indeed, it has cherished the public welfare before all selfish considerations to such an extent that on many occasions it has put to shame the predominant selfishness and sordidness of the age. Thus the world has marvelled at the lawyer who would forsake a large and lucrative practice of the law to assume the ermine and administer justice between his fellow man for a most paltry stipend, or in taking upon himself the cares of state and the uncertain tenure of public office that he might give the benefit of his trained intellect to the country that he loves and serves. It was indeed considerations such as these that promptly crowded out of our mind any suspicion of disloyalty to the common weal on the part of the bar of the country as would lead them to oppose the introduction of the Torrens System, merely on the ground of self-interest. But, if any other argument were needed to promptly disabuse our minds of such suspicion a glance at the reports of recent state bar associations all over the country unanimously approving the new system where it was made sufficiently clear, and where not understood, evidencing a very ready mind to approve if convinced of its practicability and constitutionality, is sufficient to silence the most skeptical. And it was with the view to present to the lawyers of the country a perfectly unbiased statement of the practical and constitutional features of this interesting subject that we diligently prepared the matter for this issue.

We call especial attention in this connection to the leading article of Clarence C. Smith, recorder of the court of land registration of Massachusetts, one of the best informed men on this subject in the United States, and to the annotation in the case of State v. Westfall, 89 N. W. Rep. 175, which was fortunately decided in time for publication in this issue.

NOTES OF IMPORTANT DECISIONS.

INNKEEPERS—LIABILITY FOR THEFT OF GUEST'S PROPERTY.—The recent case of Bradley Livery Co. v. Snook, 50 Atl. Rep. 358, makes an innkeeper liable for the theft of his guest's horses only where the owner or driver delivered them into his custody to be kept or cared for the night or the like. Under this holding, if the guest makes no request for care, or does not notify the innkeeper of the requirement for care, or does not deliver his horses to the innkeeper's hostler engaged for that purpose, there is no liability on the innkeeper for the loss in case the horses escape or are stolen. In this case a guest merely tied a pair of horses under a shed, without calling the innkeeper's attention to the fact, or putting the horses in the custody of his hostler. The Supreme Court of New Jersey held that this did not raise an implied contract on the part of the innkeeper to be responsible for the safety of the horses, and, in case of their loss, a resulting liability for damages for their value, the risk of their

escaping or being stolen from such a place being as obvious to the guest as it is to the innkeeper.

The case of Mason v. Thompson, 9 Pick (Mass.) 280, 20 Am. Dec. 471, would seem to point to a different conclusion. Wild, J., in that case, stated the rule as follows: "Innkeepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God or the common enemy, or the neglect or fault of the owner of the property." See also, Clute v. Wiggins, 14 Johns. (N. Y.) 175.

The court in this case distinguishes it on the ground that the property was not committed to the "care of the innkeeper."

CONSTITUTIONAL LAW—INCREASE IN SALARY OF STATE OFFICERS DURING TERM OF OFFICE.—The tendency of the day to fret under constitutional restraints and to make these great charters of our liberties, so much blank paper by construction, whenever the expediency of the hour seems to require it, is one of the dangerous signs of the times and one against which the lawyer, above all others, should set his face like a flint. In the recent case of State v. Tingey, 67 Pac. Rep. 33, the Supreme Court of Utah goes out of its way to legitimatize the action of the legislature in attempting to increase the salary of the governor during his term of office. The constitution provides that state officers "shall receive for their services a compensation as fixed by law, which shall not be diminished or increased so as to affect the salary of any officer during his term, and that the compensation of the officers named, until otherwise provided by law, is fixed as follows," etc. The court holds the constitutional provision to mean that the salaries shall remain as therein stated until changed by the legislature, and that thereafter no salary shall be increased or diminished so as to affect the salary of any officer during his term.

The argument on which this decision rests is the merest quibble. The constitutional provisions against increasing the emoluments of public officers during their term of office are founded on the strongest reasons of public policy and have always been strictly enforced. Cox v. Burlington, 43 Iowa, 612; Doe v. Washington Co., 30 Minn. 392; Apple v. Crawford Co., 105 Pa. St. 300; Garvie v. Hartford, 54 Conn. 440; Cherokee Co. v. Chew, 44 Kan. 162; Weeks v. Texarkana, 50 Ark. 81; Wheelock v. People, 84 Ill. 551; State v. Moores (Neb. 1900), 84 N. W. Rep. 399; Stork v. Gonx, 129 Cal. 526. Of course, where the constitution does not fix any salary, as it did in the case we are discussing, the authorities charged with fixing the salary, if they have not done so before the officer's election, may do so afterwards. Wheelock v. McDowell, 20 Neb. 160; Purcell v. Parks, 82 Ill. 346. In the principal case, however, the constitution *fixed* the salary, "until otherwise provided by law." It is the height of absurdity to say that in such case the compensation is not "fixed by law." As between a provision of the constitution and an act of legislature, the former does not take any inferior place as the law of the land. While an act of the legislature should be extended every presumption possible in favor of its validity, it certainly cannot be permitted to override the plain wording of the constitution.

THE TORRENS SYSTEM OF LAND REGISTRATION.

The Torrens System of land registration was conceived in the brain of Sir Robert Richard Torrens, who emigrated from Ireland to South Australia in 1840 at the age of twenty-six. After a varied political career he became the first premier of South Australia. It seems that in 1850 the first idea of the new system came to him. He was at this time collector of the customs, and the duties of his office made him familiar with the shipping laws, the principles of which as applicable to transfer and alienation he thought to apply to the registration of land. He labored for eight years without avail to get his system adopted, but finally, in 1858, the "Torrens Act" became the law of South Australia. The system there has grown steadily in popularity and efficiency until to-day nearly eighty per cent. of all the land of Australia has now been brought under its provisions and registered. Since that time the system has been adopted throughout all the provinces of Australia and New Zealand, in British Columbia, Manitoba, England, Ireland, Massachusetts, Illinois, Ohio, Minnesota and California. Its most successful operation has been in Australia, England and Massachusetts.

The prime object of this new system is to *effectually* quiet the title to land by providing by decree of court a title which is absolutely conclusive, and absolutely proof against any attack whatsoever. The method is simply to provide that, after careful examination of the title, once for all, in any of the different manners selected to regulate the initial registration, all rights entitled to be noticed will be adjudicated and will appear of record on one page of the register. Any claim, however valid, not so appearing, can be safely disregarded. Other objects are also in view, the diminution of the expense, delay, and insecurity of the ordinary abstracts of title and also the shortening of the records which in many populous counties and cities have reached stupendous and ridiculous proportions.

The examination and transfer of title is a matter of great difficulty, and after its completion is, at the best, unsafe and uncertain. A prominent member of the bar has said that a contract for the sale of real estate was about as difficult to consummate as a contract of marriage, and that it involved about as many unforseen perils and re-

sponsibilities. No better exemplification of the truth of this declaration is to be had than the sixteen hypothetical statements of circumstances, offered by Justice Cooley in his suggestions to the study of the law with which he prefaces his excellent edition of Blackstone—which would invalidate the simplest title to a tract of land although apparently valid, so far as anything that the record itself might disclose. Questions as to the validity of the original patent, as to the terms and conditions of mesne conveyances, as to marriage, dower and homestead, as to validity of attestations and acknowledgments, as to rights of minors and other incompetents, as to identity of parties making the conveyances recorded, as to undiscovered wills, as to the descent and distribution of estates under a will or otherwise, as to conflict of laws as to places where a will or deed is made, as to whether rights of mesne conveyances have been extinguished by adverse possession, as to powers of agents or attorneys, as to taxes and tax titles, as to validity and enforcement of trusts created, and many other questions incidental to these mentioned, all may arise even as to a title which is apparently valid by the "record" under the old system, and passed by an abstractor as perfect. These records afford absolutely no proof as to any of these questions. Nor do they give any conclusive proof of proper boundaries. In many instances boundaries in deeds covering thousands of acres are described by covers with an old tree, stump or stone, as a "pointer." Thus it may happen that a title with absolutely no flaw apparent on record will be passed by abstractors until in the hands of some innocent holder it becomes clouded by the assertion of some ancient claim and rendered practically valueless and unassignable by the interminable litigation that ensues.

The expense of abstracting is enormous. It has been estimated that in Illinois the annual cost of abstracts of title and their examination is over $10,000,000. And it must be remembered that this expense is increased on every transfer and on every subdivision of a larger tract into smaller parcels. Nearly ninety per cent. of such expense would be saved under the Torrens System. This expense is in addition to the loss resulting from the great delay that frequently intervenes in abstracting a complicated title. But with all this expense and delay, the purchaser still buys at his peril. The abstract vouchsafes him no security.

But the most serious objection to the present system, from an administrative standpoint, is the accumulation of books and indexes in the recording offices. In New York and Chicago, for instance, the records have multiplied to an alarming extent. In the New York county office there are now 3,031 volumes of deeds and 3,594 volumes of mortgages, making a total of 6,625, which is still increasing at the rate of 225 volumes a year. In Chicago there has accumulated 7,300 volumes of recorded deeds and mortgages. It has been calculated that at the present rate of annual increase, within fifty years these books will be so numerous as to require a large building for their keeping; and that the time and expense necessary for their examination will very seriously interfere with transfers. "Why should this be so?" asked the Hon. Eugene C. Massie before the Virginia Bar Association. "Why should the man who owns stocks and bonds be able to make sales and secure loans speedily and with little or no cost, while he who is the possessor of real estate must be subjected to tax after tax and oftentimes wholly prevented from making sale or securing a loan on account of vexatious delays and uncertainties of title?"

The system we have just described is the oldest relic of common-law barbarism. It, too, however, must follow in the wake of its old compatriot, the old style of common-law pleading. Code pleading and the Torrens System are the two most advanced steps of modern jurisprudence. Under the Torrens System the old distinctions and complexities in the law of real property are reduced to questions of merely academical interest. They are shorn of all their terrors, and can never arise to plague the innocent purchaser. Besides clearing and registering the title and facilitating its transfer, the Torrens System practically guarantees, in behalf of the state, that the holder of a registered certificate of title has an absolute and indefeasible interest which can never be questioned on any ground whatever. If any one is injured by this fiat of the state in quieting the title to land within its borders, they have recourse against an assurance fund created by the state from the proceeds of a very small tax placed on the land registered.

The method of procedure is simple. Under most acts in this country registration of land is optional with the owner, thus permitting the old and the new system to exist together. But after lands are once registered they come finally within the provisions of the act, and all subsequent transfers must comply therewith. If an owner of land desires to register his title he files in a court of competent jurisdiction (either a circuit court or a special court of land registration) his application for the registration of his title. In this application he sets forth under oath all liens, incumbrances or adverse claims which he knows to exist against the property. Notification is made on all adverse claimants, by personal service on residents and by publication on non-residents, and all unknown claimants. This process, under the act, brings all parties before the court, whether minors or otherwise incompetent or not. The court then refers the application to an official examiner who makes an exhaustive examination following all possible clews for adverse claims both within and without the record. On the report of the examiner the court determines finally all adverse claims which have been presented by the examiner or raised by any of the defendants. The court then issues its certificate

of title, which, immediately upon its issue, is conclusive proof of ownership in all courts. In some states a period of two years is given for unknown persons not actually before the court to interevene, after which no suit attacking the title can be brought. Minors, married women or other persons injured by the decree can have recourse upon the assurance fund, but the title itself is fixed. Upon registration two certificates are made out, the original being kept on file in the "register's" office, and the owner receiving a duplicate which is the only evidence of his title.

Subsequent transfers are simple. The owner produces his duplicate certificate. The buyer goes to the register's office to inspect the original certificate. If he finds indorsed thereon no incumbrance or lien, he safely makes the purchase and receives the deed and duplicate certificate. These latter he then delivers to the registrar, who, when satisfied as to the identity of the parties, notes the transfer on the register. In case of a complete transfer of title, the old certificate must be surrendered and cancelled, and a new certificate is issued to the new owner. In this way the material facts appear upon the face of every certificate, and no examination is required. It will thus be observed that no title passes by the delivery of the deed, but only after registration of the transfer. The deed is a mere contract between the parties authorizing the registrar to register the transfer. On every subsequent transfer the registrar cancels the old certificate and issues one in duplicate as before. The deed and the original certificate is kept by the registrar.

A mortgage is executed in much the same manner. The owner executes the mortgage in duplicate and delivers it together with the notes and his certificate of title to the lender. The latter turns them all over to the registrar. The latter redelivers to the lender his notes and one of the duplicate mortgages with the date of registration indorsed thereon. The registrar notes the transaction upon the original certificate of title and also upon the owner's duplicate which is then returned to the owner or borrower who may use the same again in like manner in affecting additional mortgages. When the mortgage is paid its release is noted on both the original and duplicate certificates or both certificates may be surrendered and canceled by the registrar and a duplicate issued without any record of the mortgage.

Homestead, dower and curtesy are all preserved in registered land. Trusts may also be created. Where a trust is created by a deed or will, the registrar notes on the certificate after the name of the trustee, the words "in trust" or "upon condition." No subsequent transfer of this certificate can be made without order of court who finally decides whether the proposed transfer complies with the terms of the trust or limitation.

As to judgments or other liens the act simplifies the subject of transfer to a degree. No judgment, mechanic's lien or other statutory, legal or equitable lien, except taxes or special assessments, becomes a lien on registered property until a copy of the decree or instrument on which the lien is based has been filed with the registrar and noted on the certificate of title. Thus all persons dealing with registered titles can ignore any lien not indorsed on the certificate of title in the register's office. Any person injured by the registrar's failuret to enter a lien has his remedy on the assurance fund.

The most beneficial and perhaps most radical change of this system is the application to the transmission of lands on the death of the owner. Registered land, under this system, is treated as personal property and passes to the executor or administrator and not to to the heir or devisee. The executor or administrator must file with the registrar a certified copy of the order of court before he can transfer or otherwise deal with the land. On distribution, he applies to the registrar to have the land transferred to the devisee or heir, which is done in the same manner as other transfers. "The great advantages in this change," says Mr. Theodore Sheldon in his excellent commentary on Land Registration in Illinois,[1] "in administering upon land of a deceased owner, are manifest. All questions concerning heirship, dower and rights of creditors are thus conclusively settled at the time, and do not continue, as under the old system, to remain for years afterwards as possible defects in a title."

The expense of this system is inconsiderable. In Illinois the cost of initial registration is twenty-four dollars in addition to a tax of one-tenth of one per cent. upon the value of the land for the benefit of the assurance or indemnity fund. This last tax is only paid on the initial registration and on subsequent transfers by descent or devise. The entire expense of all other transfers does not exceed three dollars.

No title to registered lands can be acquired by presumption or adverse possession, as no title passes or is affected by any act of the owner or anyone else until duly noted on the certificate in the possession of the registrar. The old certificates are cancelled upon every conveyance or loss of the fee and a new certificate issued to the new owner. If there is a change of title to only a portion of the land, the old certificate is cancelled and replaced by new certificates. It will thus be seen that the title is always perfect and can never be successfully attacked. There is only one certificate of each parcel of land on file at any one time in the registrar's office and that certificate is conclusive as to the exact state of the title and as to the extent and character of the incumbrances thereon.

It is thus observed that the last of the old feudal principles which have clogged the tenure and transfer of real property for so long has re-

[1] Land Registration in Illinois, by Theodore Sheldon of the Chicago Bar, published by Callaghan & Co., Chicago.

ceived its death blow in the system which we have just outlined. With it goes much that is dear to the heart and mind of the lawyer but much that has shackled and hampered the alienation and usefulness of the most valuable asset in the community.

St. Louis, Mo. ALEXANDER H. ROBBINS.

TORRENS REGISTRATION OF REAL ESTATE TITLES, AND ITS PRACTICAL OPERATION IN MASSACHUSETTS.

The United States are indebted to Australia for two striking innovations in their systems of state government, the secret, or Australian ballot and the Torrens system of registering titles to land. Both seem to be simple and effective, and what would naturally have been thought of first, but no one did think of them in this country, and perhaps never would, if the attention of legislators and reformers had not gradually been attracted in recent years to the advantages of the Australian voting and land title systems over our own. It was then discovered that Sir Robert R. Torrens introduced his land title system into South Australia in 1858. He was a collector of customs at Adelaide, and drafted the original "Torrens Title Act," after the "Merchant Shipping Act," of 1854, for the mortgage and sale of ships, with which he was doubtless familiar. Torrens was not the first inventor, so to speak, for similar systems had been in operation in parts of Europe for many years before, as for instance, in Vienna at least since 1368, in Prague 1377, in Munich 1440, in Austria 1811, in Saxony 1843, and in Hungary 1849; but he seems to be the first person who obtained letters patent to indissolubly link his name with the system. It is also interesting to notice that the Australian system was not the production of any lawyer or skilled conveyancer, but was conceived and put into operation by a business man. Property in land or property in a ship doubtless seemed to him an indifferent matter, if the one paid as well on the invested capital as the other. The evidence of ownership was a mere matter of detail, the right to have and to hold, to manage and make profitable was, and ever will be, the important fact of ownership of property. He was doubtless satisfied with the certain and simple method by which the government furnished a certificate as evidence of one's ownership of a vessel, and naturally thought, "let's do the same way as to land," and thereupon proceeded to do it. Alas, he little knew, we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the "unknown claimant," the "party entitled to notice," "the person under disability," "the absent defendant," and other well-known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property, as distinguished from personalty, with the blind unholy accuracy of the potato bug seeking its own peculiar vine.

Cromwell, that embodyment of stern common sense, condemned the "godless and profitless jungle" through which land titles were searched. Yet the same chaotic system has continued to the present time. Herein lies the strongest indictment of the business man of to-day against the laws' delays and shadows in reference to real estate titles. What is the answer to the impatient question, "Why is my right of ownership in a piece of real property to be the subject of ceaseless inquiry and examination? I never have this trouble when selling or pledging personal property." There is no reasonable answer. The question suggests a condition crying for some remedy. If a modicum of the advancement in science for the last one hundred years could have prevailed in the field of real property law, "flaws in the title" would now be only the mummery of by-gone days.

But a genuine awakening seems to have come about at last. Ohio passed the first act embodying the principles of the Torrens System, and the same was promptly cast out into everlasting darkness[1] by the state supreme court on the ground of unconstitutionality. The act was held fatally defective, because the original decree of registration was founded on insufficient notices and lack of judicial proceedings. The court found some other objections which have not been sustained by subsequent decisions of the courts of last resort in three

[1] State v. Guilbert, 56 Ohio St. 575, 629.

other states.[2] Illinois followed with an act which, after amendment, was sustained by its supreme court.[3] Next the Massachusetts act[4] was passed, and in due time held to be regularly begotten out of the loins of the constitution, both state and federal,[5] and the writ of error to the United States Supreme Court was dismissed[6] by that court. In the meanwhile California and Oregon passed land registration acts, and lastly Minnesota; and the act in the latter named state has just been sustained[7] by its supreme court. Similar acts are being considered in various other states, and a bill[8] copying the Massachusetts act *verbatim* has been introduced in the senate of the United States by Senator McMillan, providing for the registering of land titles in the District of Columbia. It may now safely be assumed that, if acts are properly drawn, they will be sustained as constitutional by the state courts on the authority of the Illinois, Massachusetts and Minnesota decisions, that the United States Supreme Court will consider no appeal from the decision of a state court on its merits if the plaintiff has not suffered an actual loss,[9] and then the decisions will be only as to the particular case[10] presented; and if reasonable time and notice are given respondents to appear and answer, that the state "has power by statute to provide for the adjudication of titles to real estate within its limits,"[11] and to enter conclusive degrees of ownership.

What is the ultimate end sought for in Torrens title legislation? Simply to have on file in the registry of deeds a single sheet of paper, of which the owner has a duplicate containing the name of the owner of a given piece of land, a description of the land referring to a filed plan of the same containing sufficient *data* to enable an engineer to reproduce the boundary lines at any future time, and a list of the incumbrances against such land in the order of their priority, which sheet of paper, called the "Certificate of Title," shall be conclusive evidence in any court of all matters stated therein, and unassailable for any cause whatever, except for fraud of the holder or forgery.

With that object attained, what are the advantages flowing therefrom to the land holders of a given state? They are many. It makes real property a quick asset, the same as stocks, bonds and other forms of personalty. In times of panic and stringency in the money market "it would be of great benefit if all the real estate of the community, possessing as it does, greater stability of value than anything else, could be made as immediately available as a means of raising money as stocks of goods or other personal property."[12] The saving of expenses for repeated searches of the same titles would amount to a very large sum of money annually to the people of any state. In the two most populous counties of Massachusetts, Suffolk and Middlesex, there are now recorded each year not less than thirty thousand deeds and mortgages. It is fair to assume that the charges for examining titles in these various transactions would aggregate not less than $300,000. The saving in time and human energy would be great. At present it ordinarily takes from one to three weeks to consummate a real estate transaction. The deal may be consummated just as well in one day if the land is registered. The county expenses for keeping the public records would be materially diminished.[13] One register of deeds estimates that half his present force would suffice if all the land in his district was registered. The quarters for registries of deeds have to be frequently enlarged at great public expense to provide space for storing the rapidly multiplying records.[14] Within the last ten years the four leading registries of the state have all been provided with new and enlarged quarters, and two of them are already filled up again. It would be entirely practical under a land registration act, at short intervals, to de-

[2] People v. Simon, 176 Ill. 165; Tyler v. The Judges, etc., 175 Mass. 71; Minnesota v. Westfall (Feb. 14, 1902), 89 N. W. Rep. 175, 54 Cent. L. J. 290

[3] People v. Simon, 176 Ill. 165.

[4] Ch. 128, Revised Laws.

[5] Tyler v. The Judges, etc., 175 Mass. 71.

[6] Tyler v. The Judges, etc., 179 U. S. 405.

[7] Minnesota v. Westfall (Feb. 14, 1902), 89 N. W. Rep. 175, 54 Cent. L. J. 290.

[8] Senate Bill No. 1911, 57th Congress.

[9] Tyler v. The Judges, etc., 179 U. S. 405.

[10] Roller v. Holley, 176 U. S. 398.

[11] Arndt v. Griggs, 134 U. S. 316, 327.

[12] Gov. Wm. E. Russell's message to the Massachusetts Legislature, Feb. 17, 1891.

[13] Report of Controller of Accounts to Legislature of 1901, Public Document, 29, p. 29.

[14] Land Registration Act of Massachusetts, pamphlet distributed from land office at Boston, p. 6.

stroy all cancelled certificates, deeds authorizing the same, and discharged documents on file, and thus prevent the constant necessity for more space in a record office. The added security of holding to a real estate investor is immense. His certificate of title tells the whole story. The only adverse rights in his land that can legally exist must be registered rights, noted on his certificate in black and white, which is conclusive evidence of his ownership and the nature and extent of all incumbrances. The holder of land under the old system is never aware of what a day may bring forth. The most careful examination of title will not necessarily disclose fatal defects, or there may be serious record defects which his examiner fails to discover, or more commonly to fully appreciate the legal effect of. State courts are constantly engaged in hearing real actions which under a proper and sensible registry system could never arise. A suit in equity is the only proceeding in the nature of a real action that can be brought against the land described in a registered certificate of title; and the only question open in such suit is whether the present holder thereof by the exercise of fraud or forgery obtained the issuance of the same in his name, or if the land should be charged with some trust or equity which he himself is responsible for.

What are the practical results of the operation of a land registration act in Massachusetts thus far? Petitions for registration of land have been filed in the court of land registration from sixty-nine of the cities and towns of the commonwealth, aggregating in assessed value about three million dollars. Dealings in registered land, after original decrees for registration, have begun in eleven of the twenty-one registries of deeds in the state. About one thousand certificates of title have probably been issued, and the number of documents registered creating incumbrances, and noted on the incumbrance side of certificates, would be very many more. The classes of property registered include nearly all forms of real estate, except expensive business blocks in the cities, the fees for which would be quite high. Under another classification, however, petitions will usually come under one of three heads: first, where the record title is defective or the real title in dispute; second, where a large tract of land is about to be cut up into streets and lots and offered for sale to dwelling house builders; and third, where parties, individually or in trust capacities, who are about to invest in real estate, require titles to be registered before purchasing or making a loan, so as to insure absolute security of holding. Those who have dealt most in registered land, or made loans on registered certificates, appear to be best satisfied with the operation of the system, and with entire unanimity testify to the saving of time, trouble and money in their transactions, and to the absolute security of their holdings and certainty of boundary lines enjoyed. There has been but one suit brought against a certificate holder, and that of the nature heretofore suggested, namely: a bill in equity, alleging that the holder of the certificate purchased the land described in the same with money intrusted to him by the complainant for that purpose, and that he fraudulenty took out a certificate in his own name instead of the complainant's, for whom he was merely acting as agent. Experience in Massachusetts demonstrates the fact that if officials are discreet and painstaking in the administration of a registration act, claims made against the assurance fund will be exceedingly rare. No claims whatever have thus far been made in Massachusetts. Great care is exercised in all original petitions to find and personally notify all possible adverse claimants stated by the petitioner, disclosed by the report of the official examiner of the record title, or otherwise brought to the attention of the court. Notice to all known parties is by registered mail, which experience has demonstrated to be the surest method of actually reaching a party. As to unknow respondents constructive notice by publication and posting on the land must need suffice. But if there is any clue to follow, resort is made to a published request for information of the whereabouts of the unknown party, or a notice is posted in some locality where the party may have formerly have resided. A notice thus posted in a little village in France brought an appearance in court for a party who had for years been missing. It does not follow that such parties have any maintainable claim, but they ought in every instance to have an op-

portunity to be heard, more in deference to the long established rules of the common law perhaps, than because such parties are likely to have valuable rights to preserve. Indeed, the writer is of the opinion from experience thus far that not one party among the very many notified in this class of respondents has had a claim that he could successfully maintain as plaintiff. It is easy in argument to construct a set of facts establishing title in a party who suddenly disappears and as suddenly reappears, in person or by his heir, after a long lapse of time; but as a matter of fact owners of real estate do not go away and leave their property unattended for twenty years or more. It isn't profitable. And, besides, the Anglo-Saxon has a notion that it is so far one's duty to roost on his land, that if he neglects to do so for twenty years the place of his former abode shall know him no more.

Experience has also demonstrated that if a state establishes a separate court to administer a land registration act, it may, and eventually should, become the forum in which all questions relating to the legal title to real estate are tried in the first instance. The Massachusetts act gives the court of land registration jurisdiction to decide all questions arising upon a petition for registration of title to a given parcel of land, subject to a general appeal to the superior court with or without a jury trial, or to the supreme court direct on questions of law. In the various petitions for registration of titles thus far filed, about every conceivable legal question relating to real estate has arisen one or more times. The advisability of such a court for the trial of all real actions is in accordance with the modern idea of specializing every form of business, public or private. The form of proceedings gives the court in every instance the advantage of a full abstract of the record title by a disinterested official examiner, and a plan of the land as it actually exists when the petition is filed, the two important prerequisites to a proper understanding and decision of the average real action. With these reasons in view, it may be assumed, Attorney-General Knowlton, in his report to the legislature of 1902, in speaking of the court of land registration, says: "Having thus created an important court of record having possible jurisdiction over all the real estate of the commonwealth, the commonwealth, in my judgment, should foster the growth of the jurisdiction of the court, and, so far as may be, relieve the other courts from questions affecting land titles. It can well be, and in my opinion should be, made the real estate court of the commonwealth, to the same extent as the probate court has jurisdiction over estates of deceased persons."[15]

The writer is enabled to say in the light of experience thus far that the Massachusetts act may safely be taken as a model by other states in drafting similar acts, with two exceptions: first, if a state legislature considers a land registration act worth adopting at all, it ought to provide in the original bill for compulsory registration to some extent, so that the transition from the old system to the new will be more rapid and systematic than under purely voluntary actions; second, while the title to real estate under the Massachusetts act passes only by issuance of the certificate, deeds and mortgages in common form are still required to be executed and filed with the assistant recorder for the district where the land lies. They merely amount to a written request to him to issue a new certificate to the grantee, or to charge the mortgagor's certificate with a new incumbrance. It costs money and takes time to write these papers. Their use may well be dispensed with altogether, and the ordinary methods of a stock transfer office adopted. When a sale is made the seller can indorse his duplicate certificate in blank, hand it to the purchaser who will turn it into the transfer office, to-wit: the local registry of deeds, and order a new certificate in his own name. If the property is to be mortgaged let the owner give a collateral note for the amount borrowed, indorse his duplicate certificate in blank, and deliver the papers to the mortgagee. This would be a radical departure from the methods of the fathers, but it is the ordinary course of business in transactions in personal property aggregating and averaging in any large business community many times the money value of its real estate transactions, and all with very rare instances of loss or damage that would not, under either system be inevitable.

Boston, Mass. CLARENCE C. SMITH.

[15] Public Document, No. 12, p. 20.

ORIGINAL CERTIFICATE OF TITLE.

Entered pursuant to a decree of the court of registration, dated at Boston, in the county of Suffolk and commonwealth of Massachusetts, the twenty-fifth day of September, in the year eighteen hundred and ninety-nine, and numbered 84 on the files of said court.

COPY OF DECREE.

Commonwealth of Massachusetts, Suffolk, } ss.
Court of Registration.

In the matter of the petition of Rosina Dahl, numbered 84, after consideration, the court doth adjudge and decree that said Rosina Dahl, of Boston, in the county of Suffolk and commonwealth of Massachusetts, not married, is the owner in fee-simple of that certain parcel of land situate in that part of Boston, formerly Roxbury, in the county of Suffolk and commonwealth of Massachusetts, bounded and described as follows:

(Several lots of land.)

And the court doth adjudge and decree that said land be brought under the operation and provisions of the land registration act, and that the title of said Rosina Dahl to said land be confirmed and registered; subject, however, to any of the incumbrances mentioned in section 39 of said act as amended by chapter 131 of the acts of 1899 which may be subsisting, and subject also to a mortgage given by Henry Dahl to the Provident Institution for Savings in the town of Boston, dated May 21, 1884, and to a second mortgage given by Rosina Dahl to said institution, dated April 28, 1899, both filed and registered herewith, and both covering the first parcel of land hereinbefore described.

Witness, LEONARD A JONES, Esquire, Judge of the Court of Registration, in said county of Suffolk, the twenty-fifth day of September, in the year eighteen hundred and nine-nine, at 10 o'clock, and 30 minutes in the forenoon.

Attest, with the seal of said court, Clarence C. Smith, Recorder. (Seal.)

A true copy. Attest, with the seal of said court, Clarence C. Smith, Recorder. (Seal.)

Received for transcription at Suffolk County Registry District, Boston, September 30, 1899, at 9 o'clock and 50 minutes, A. M.

A true copy. Attest, with the seal of said court.

(Seal.) THOS. F. TEMPLE.
Assistant Recorder.

MEMORANDA OF INCUMBRANCES ON THE LAND DESCRIBED IN THIS CERTIFICATE.

Document Number.	Kind.	Running in Favor of.	Terms.	Date of Instrument.	Date of Registration.	Signature of Assistant Recorder.	Discharge.
93	Mortgage on first lot.	Prov. Inst'n for Sav.	$6,000, 3 yrs. 4½ per ct.	May 21, '84.	1899, Sept. 30, 9:50 a. m.	M. D. C. Issued. Thos. F. Temple, Assistant Recorder.	
94	Mortgage on first lot.	" " "	$2,000, May 21, 1900, 4½ per ct.	Apr. 28, '99.	Sept. 30, 9:50 a. m.	M. D. C. Issued. Thos. F. Temple, Assistant Recorder.	

Sample Page of Certificate under Torrens System.

CONSTITUTIONAL LAW—TORRENS SYSTEM OF REGISTRATION.

STATE v. WESTFALL.

Supreme Court of Minnesota, February 14, 1902.

Chapter 237, Laws 1901, providing for the Torrens System of registering land titles, is not unconstitutional in that it is special legislation; nor in that it deprives the owner of his interest in land without due process of law; nor in that it violates article 3 of the constitution, vesting the powers of government in three distinct departments; nor in that examiners of title provided for by the act are appointed by the court, and not elected as county officers are required to be by section 4, art. 11, Const.

START, C. J.: This is an information in the nature of *quo warranto* to determine the respondent's right to the office of examiner of titles, to which he interposed a general demurrer. The sole issue of law raised by the demurrer is this: Is chapter 237, Laws 1901, by virtue of which the respondent was appointed such examiner, providing for the Torrens System of registering land titles, constitutional? The basic principle of this system is the registration of the title of land instead of registering, as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof delivered to him. In the other the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered. Necessarily the initial registration of the title—that is, the conclusive establishment of a starting point binding upon all the world—must rest upon judicial proceedings. The act in question provides for such proceedings and the full detail thereof, which will be referred to as we proceed. The act, by its terms, applies only to counties having more than 75,000 inhabitants, and registration is made optional with the landowner. It is the contention of the relator that the act is unconstitutional for the reasons:

The act is void because it contemplates the taking of property without due process of law, in violation of both state and federal constitutions. The act provides, among other things, that the owner of any estate or interest in land may have the title thereto registered by making an application in writing, stating certain facts, to the district court of the county wherein the land is situated. Thereupon the court has power to inquire into the state of the title, and make all decrees necessary to determine it against all persons, known or unknown. The application must be filed and docketed in the office of the clerk of the court, and a duplicate thereof filed with the register of deeds, who is *ex officio* registrar of titles. The application is then referred by the court to an examiner of titles, who investigates the titles, and inquires as to the truth of the allegations of the application, particularly whether the land is occupied or not, and makes and files a report of his examination with the clerk. Upon the filing of the report the clerk issues a summons by order of the court, wherein the applicant is named as plaintiff, and the land described, and all other persons known to have any interest in or claim to the land and "all other persons or parties unknown" claiming any interest in the real estate described in the application are named as defendants. The summons must be directed to such defendants, and require them to appear and answer within 20 days. It must be served in the manner now provided for the service of summons in civil action, with this exception: that the summons shall be served on non-resident defendants and upon all unknown person by publishing it in a newspaper printed and published in the county where the application is filed once a week for three consecutive weeks. In addition to such publication the clerk shall, within 20 days after the first publication, mail a copy of the summons to all non-resident defendants who place or address is known, and the court may order such additional notice of the application as it may direct. Any interested party may appear and answer. If no appearance is made, the court may enter the default, but must take proof of the applicant's right to a decree, and is not bound by the report of the examiner, but may require further proof. If appearance is made, the case shall be set down for trial, and heard as other civil actions. If the court finds that the applicant has title proper for registration, a decree confirming the title and ordering registration shall be entered. Every such decree shall bind the lands and quiet title thereto, except as otherwise provided in the act, and shall be forever binding and conclusive upon all persons, whether mentioned by name or included in the expression "all other persons or parties unknown," and such decree shall not open by the reason of absence, infancy, or other disability, or any proceedings at law for reversing judgment, except as provided in the act, but appeals may be taken to the supreme court as any other civil action. Any person who has any interest in the land, and who has not actually been served or notified of the filing of the application, may at any time within 60 days from the entry of such decree appear, and file his sworn answer, providing no innocent purchaser for value has acquired an interest. If there is any such purchaser, the decree of registration remains in full force forever, subject only to the right of appeal, and the person aggrieved must look for his relief to the assurance fund mentioned in the act, and to any person procuring the decree by fraud. Every person receiving a certificate of title and every subsequent purchaser in good faith takes the same free from all incumbrances, except such as are noted thereon. Upon entering the decree of registration, a certified copy thereof must be filed by the clerk in the office of the registrar of titles, who proceeds to register the title pursuant to the

decree. This he does by entering an original certificate in the registrar of titles, and delivering a duplicate thereof to the owner, who may thereafter convey his title by the execution of deeds and the surrender of his certificate to the registrar for cancellation, who issues a new certificate to the purchaser. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. The judges of the district court are required to appoint one or more attorneys as examiners of title, whose salaries are to be fixed by the board of county commissioners. Such examiners may act as referees on any pending application, but all their acts are subject to review by the district court. Every applicant must pay one-tenth of 1 per cent. on the assessed value of the land to be registered for the purpose of creating an assurance fund, to be held in trust for the benefit of any one sustaining loss by the operation of the act. Such is a brief outline of the provisions of the act, which it is necessary to have in mind when considering the question whether the act authorizes the taking of property without due process of law. Counsel for the relator suggests several objections to the law, which are not *germane* to the particular question whether the act contemplates the taking of property without due process of law. Attention is called to the fact that the act (section 20) allows the defendant 20 days after the service of the summons in which to appear and answer while by the prescribed form of the summons they are required to answer in 10 days. This discrepancy does not affect the constitutionality of the law, or its practical operation, for it is apparent, when all of the provisions of the act as to the summons and the time within which the defendants must answer are considered, that the prescribed form of the summons, in so far as it requires the answer to be filed in 10 days, must yield to the other express provisions upon the subject, and 20 days be substituted in the form for 10 days. Again, it is suggested that land held under a registered title cannot be gained or lost by adverse possession, while all land in the counties of the state to which the act does not apply may be so lost or gained; and, further, that the landowners in the counties to which the act applies have a remedy for clearing their titles from clouds, and quieting them, not accorded to other landowners of the state. These are suggestions pertinent to the legislative question of classification, but not to the question whether the procedure for securing a decree quieting the title to the land as a basis for the initial registration is due process of law. If the classification was authorized, none of the suggested matters render the act invalid. It is also contended by the relator that under the provisions of the act a person may be in actual possession of land the title to which is to be registered and service made upon him by publication, which may result in his being registered out of his title thereto without ever having any actual knowledge of the judicial proceeding instituted to secure a decree clearing and quieting a title as a basis for the initial registration. If this be the correct construction of the provisions of the act relating to the service of the summons, they do not constitute due process of law. Baker v. Kelley, 11 Minn. 480 (Gil. 358). But the act is not reasonably susceptible of such a construction. The application for registration must be presented to the district court of the county in which the land is situate; hence such occupant is not a non-resident party, nor an unknown one. Having possession of the land, he has an apparent interest therein, and, if he is not the applicant, must be made a party defendant, and the summons served upon him as in civil actions. It is only on non-residents and unknown persons or parties that service by publication may be made. Nor is this all. One of the matters which the examiner is particularly charged with the duty of investigating and reporting upon is the occupation of the land, to the end that the court may be advised as to all adverse claimants in possession, that they may be made parties to the proceedings, and served with the summons. It is not reasonably possible, if the mandates of the act are observed, that in any case the occupant of the land would not be made a party to the proceedings, and duly served with the summons. Actions and proceedings to conclusively establish rights and titles against all claimants and parties, known and unknown, are not novelties in our jurisprudence, for decrees probating wills, distributing estates of deceased persons, quieting title to real estate against unknown heirs and unknown parties, have been repeatedly held to be conclusive on the whole world. It is now the settled doctrine of this court that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all of the known claimants within the jurisdiction of the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto. The proceeding provided for by the act in question is such a one. It is substantially one *in rem*, the subject-matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for the serving the summons and giving notice of the pendency of the proceedings are full and complete, and satisfy both the state and federal constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. That the courts of this state have jurisdiction to so clear and quiet title

by their decrees is no longer an open question in this state. Shepherd v. Ware, 46 Minn. 174, 48 N. W. Rep. 773, 24 Am. St. Rep. 212; Inglee v. Welles, 53 Minn. 197, 55 N. W. Rep. 117; McClymond v. Noble (Minn.), 87 N. W. Rep. 838.

It is further claimed by the relator that the provision of the act which limits the exercise of the right to a party not actually served with process or notified of the proceeding to apply to the court to open the decree and permit him to answer to 60 days after the entry of the decree, and that no proceeding shall be had for the recovery of the land after that time, is unconstitutional. It is urged in this connection that the legislature cannot require a person in the unchallenged possession of land to commence an action or institute any proceeding within a limited time to vindicate his claim, or be barred of all rights in the premises. This is true. Baker v. Kelley, 11 Minn. 480 (Gil. 358). But it is equally true that when a party so in possession is by a summons served as in civil actions, and thereby notified that the land he occupies is claimed by another, and that he is required to appear in court and defend against the claim, he must so do, or be conclusively barred by the judgment entered in the proceeding. Now, as already suggested, all persons in possession of the land must be made parties to the proceeding to secure the registration of the title thereto, and the summons must be served upon them. If the act is complied with, it is extremely improbable that an adverse claimant in actual possession of the land would fail of receiving notice of the pendency of the proceeding to register the title. However this may be, it is reasonably clear, and we so hold, that the particular provision of the act, which, in effect, forbids the commencement or the defense, in opposition to the decree, of any action or proceeding to recover the land brought more than 60 days after the entry of the decree, does not apply to an adverse claimant in the actual possession of the land, upon whom the summons is not served; for, being in possession, he cannot bring such an action, and his right to defend his possession and title in such a case cannot be made to depend upon his non-action. So construed, the provision of the act both as to the opening of the decree and as to the commencement of any action or proceeding to recover the land in opposition to the decree is valid as a statute of limitations. The time limit seems to us to be a short one, but, in view of the complete and far-reaching provisions of the act for notice to all parties, and the fact that the right of appeal as in civil actions is given, we cannot hold that the legislature arbitrarily exercised its discretion in fixing the limit. State v. Messenger, 27 Minn. 119, 6 N. W. Rep. 457; Russell v. Lumber Co., 45 Minn. 376, 48 N. W. Rep. 3; Mortgage Co. v. Gibson, 77 Minn. 394, 80 N. W. Rep. 205, 777; Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. Rep. 983. Our conclusion, then, is that the act is not unconstitutional in that it deprives parties of their interest in land without due process of law. Similar statutes providing for the Torrens System of registration have been sustained against a like objection by the courts of other states in carefully considered opinions. Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N. E. Rep. 812, 51 L. R. A. 433; People v. Simon, 176 Ill. 165, 52 N. E. Rep. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175. A contrary ruling was made in the case of State v. Guilbert, 56 Ohio St. 575, 47 N. E. Rep. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756; but the provisions of the statute passed upon in that case as to notice to all persons having any possible interest in the land were not as full as they are in our statute.

That the act, in so far as it attempts to confer upon the district courts the power to appoint examiners of titles, is void, because it violates article 3 of the state constitution, vesting the powers of government in three distinct departments. The claim is without merit. Judicial power includes the authority to appoint all necessary subordinate officers or assistants essential to the conducting of judicial business. The examiners provided for by this act are subordinate officers or assistants of the courts, to aid them in the discharge of the judicial duties imposed upon them by the act. It was therefore competent and proper for the legislature to provide for their appointment by the courts, as much so as would be a statute authorizing them to appoint a stenographer or a receiver in insolvency. Nor does the act contravene article 3 of the constitution by conferring judicial duties upon the registrars of titles, for it expressly provides that "all acts performed by by registrars * * * shall be performed under rules and instructions established and given by the district court having jurisdiction of the county in which they act." The registration is the act of the court. The fact that it may be done by the registrar, under general orders, where there is no question, is not different from the power of the clerk to enter judgment, in cases ripe for judgment, under a general order or rule of the court. Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N. E. Rep. 812, 51 L. R. A. 433. Nor does the act attempt to make the court a registration office, as relator claims. It simply confers upon the court certain judicial duties incident to the plan of registering land titles provided by the act.

The last reason urged why the act is invalid is that the office of examiner of titles is a county office, which must be filled by popular election, as required by section 4 of article 11 of the state constitution. Examiners of titles are not county officers, within the meaning of this constitutional provision, for the reason already stated in connection with the consideration of the question as to the power of the court to appoint them.

We therefore hold that chapter 237, Laws 1901, is constitutional. Writ quashed.

NOTE.—*Constitutionality of the Torrens System of Land Registration.*—It has been said that two questions, of vital import, confront the framers of American Torrens Acts: first, how to secure a valid initial registration; and second, to what extent conclusiveness may be given to the act of the registrar in his subsequent dealings with the registered title. The necessity for a proper answer to these questions becomes important because of the constitutional limitations peculiar to this country and which do not hamper the legislatures of foreign countries.

We can most safely approach a discussion of this question through a clear understanding of the leading case of Arndt v. Griggs, 134 U. S. 316. The exact question in this case was the validity of a state statute providing for service of process on non residents by publication in actions to quiet title to land situated within the jurisdiction of the state. The court held that a state had the right to provide by statute that the title to real estate within its limits may be settled and determined by a suit in which a non-resident defendant has been brought in by publication. The particular value of this decision, however, is the discussion by Justice Brewer on page 320 of the opinion, of the general jurisdiction of the state over the title to lands within its boundaries. Justice Brewer says: "What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non residents to such real estate? If a state has no power to bring a non resident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits, and the conditions of ownership of real estate therein, whether the owner be *stranger* or *citizen*, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or is against natural justice." It might also be mentioned in this connection that in many states lands of resident and non-resident owners are taxed and sold for taxes, and the owners thereby are often totally deprived of their lands, although no notice is ever given to such owner, except a notice by publication, or some other notice of no greater value, force or efficacy. See Beebe v. Doster, 36 Kan. 666, 675. The practical reason for this rule is an "overruling necessity." Indeed, it is too great an evil in any community, and especially in new states, to have titles to land insecure and uncertain, thus preventing its alienation and retarding its improvement. This very uncertainty and insecurity the particular legislation known as the Torrens System of land registration is designed to remedy, and under the decision of Arndt v. Griggs is a perfectly valid subject of state legislation and wholly within the discretion of the legislature. The only way its validity could be determined with reference to the federal constitution would be in some *particular* case in which the facts in that case show an absence of what is known as "due process of law," and even then the decision would not go beyond the particular facts. See Tyler v. Judges, 179 U. S. 405.

There is no better instance of the depressing effect of a strict and unbending construction and application of constitutional provisions formulated in an earlier age to the changing conditions and requirements of future generations than in the consideration of the subject now before us. If a written constitution can be construed to shackle a sovereign people to a weight of useless and discarded antiquities, when, but for such limitation, they could by one stroke free themselves from its incubus, they are no longer a sovereign people. That fact has always been the fatal objection to such constitutions, and it has been due principally to the common sense and practical wisdom of American judges that this common fatality has not endangered the life and successful operation of our own constitutions both state and federal; and the same liberal and enlightened spirit is observable in the application by the courts of the constitutional test to the attempts at duplicating the Torrens System of legislation in this country.

The first constitutional difficulty in introducing this system of legislation is encountered in making provision for a judicial determination of the title on the initial registration. The first Illinois act, passed in 1895, clothed the registrar with authority to determine the title on the application for the first certificate upon the concurrent advice of two competent attorneys as examiners. This determination, however, was not to be valid until after the expiration of a period of five years' limitation. After that period the title would be absolutely inviolable. This statute came up before the Supreme Court of Illinois in 1897, in the case of People v. Chase, 165 Ill. 526. The court considered no other phase of the law than the one just mentioned, and held the entire act void because it conferred judicial power on the registrar, thus violating that section of the constitution providing that judicial power shall be vested in courts therein named. The court, through Justice Wilkin, goes into a long discussion of what is an exercise of judicial power, and reaches the uncontrovertible conclusion that an adjudication which involves the construction and application of the law and affects any of the rights and interests of the parties, though not finally determining them, is a judicial proceeding and involves the exercise of judicial power. The court said: "It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified, under the constitution, to exercise those powers than is done by this law. This, doubtless, resulted from an attempt to adopt the provisions of a similar law in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction exists against the legislative grant of such

powers upon non-judicial officers." The same and additional objections were raised by the Supreme Court of Ohio a few months following the Illinois decision to similar legislation in that state. In the case of State v. Guilbert, 56 Ohio St. 575, 47 N. E. Rep. 551, 60 Am. St. Rep. 756, the attempt at transplanting the Torrens System into Ohio soil was rudely nipped in the bud, the court assigning as its principal grounds of objection that the act failed to provide for proper service upon adverse claimants residing within the jurisdiction, and that it attempted to confer judicial power upon a county recorder, a purely ministerial officer. It seems from the view which the court takes of the provision for notice, only those parties named by the applicant as adverse were to be served, and these, if they lived without the county, were to be served by mail. The court said on this point: "One known to claim the title in fee-simple adversely to the applicant need not be named, though his place of residence may be within the county and known. . . . Is this such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion." The court holds in this connection that the proceeding for initial registration partakes much of a bill to quiet title, but that it is in no sense an action *in rem*, giving the legislature the right to prescribe such notice as is appropriate to such proceedings. After considering the act in these particulars the court launches into a general diatribe of its other provisions. The provision for an assurance fund is handled very gingerly. "It is not likely," the court says, "that the legislature has thought itself authorized to provide for making whole those who have been defeated in judicial proceedings of an adversary character, involving only private rights, and conducted according to the law of the land. The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them without due process of law. When the provisions of the constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden." The court then goes into an explanation of the constitutional inhibition against taking private property for private purposes, even if compensation is made. Further, the court says on this point: "Considering the purposes for which government is instituted, and the high conception of individual right which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution." The court here fails to distinguish between the operation of constitutional limitations on the acts of the federal and state legislatures. While the former are compelled to find in the constitution their authority for every attempt at legislation, the latter have an unlimited range save as to its express prohibitions. There is nothing to prevent state legislatures from guaranteeing titles. The court closes its opinion with a thrust at the general impracticability of the whole scheme: "However, the general system proposed by this act may have operated where no system of registration previously existed, and the conserving influences of constitutions are not enjoyed, it seems, in its prominent feature, to be inapplicable where constitutional provisions, paramount to legislative enactments, protect vested rights and restrict the state to the exercise of functions that are governmental in their nature."

These earlier decisions would seem to have been calculated to discourage the advocates of this system in their attempt to acclimate this wild growth of Australian civilization to that peculiar constitutional modification of Anglo-Saxonism known as American jurisprudence. But it did not. Illinois tried it again after removing the objectionable features complained of in the first attempt, and provided for the initial determination of the title to be made in a regular proceeding in a court of equity whose decree would be absolutely conclusive and entitled to be registered under the act. This act came before the Supreme Court of Illinois in 1898 in the case of People v. Simon, 176 Ill. 165, 52 N. E. Rep. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175, where the court sustained the entire law except as the provision for substituted service on residents. It is a well-known principle of constitutional law that a decree undertaking to bind persons residing within the state, and who do not conceal themselves, upon substituted service, and not upon actual service of summons, is a nullity, and cannot bind such parties. People v. Guilbert, 56 Ohio St. 575, 38 L. R. A. 519; Brown v. Commissioners, 50 Miss. 468; Bardwell v. Collins, 44 Minn. 97; Pennoyer v. Neff, 95 U. S. 714; Webster v. Reid, 11 How. (U. S.) 459, Justice Wilkin, voicing the court's opinion, held in view this consideration. The exact holding of the court was that this new law in providing that vested rights in real property should be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing shall be determined by the provisions of that law, was not unconstitutional as authorizing the taking of private property without due process of law. But the court further held that section 26 of that act, in so far as it attempted to bar vested rights after the expiration of two years from the rendering of a decree in a suit to which the holders of such right were not parties, cannot be upheld, although it was perfectly valid as a limitation law limiting the time within which one who has a mere right of action shall bring suit. Probably the greater part of the opinion of the court is taken up with a discussion of the question whether or not the act gives judicial power to the registrar, not as to the initial registration, but as to the authority to pass upon the validity of subsequent transfers, liens or incumbrances. The court held that the powers of the registrar after the initial registration were not strictly judicial, the discretionary power which he exercised in this regard being *quasi* judicial, and incidental to the proper performance of his ministerial duties. It must be admitted in this connection that the court is treading very near a precipice. For instance, that section of the act which empowers the registrar, on the transfer of any property "in trust" to finally pass upon the question whether the conditions of such trust are properly performed, is very near to being a judicial act. We firmly believe that the only way to meet this constitutional objection against conferring judicial powers on non judicial officers is the establishment of a regular court of land registration as provided in the Massachusetts act. In that case every act which partakes of a judicial nature is decided by a court of competent juris-

diction. As to whether the initial registration amounts to "due process of law" the court answers affirmatively, except as to the operation of section 26, which provides that any person having an interest in the land, whether served by notice or not, must, within two years, file an answer or the decree will become forever binding. The court says: "A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims." The court holds, however, that this objection does not invalidate the act, and that in practice, if care is used, it will not affect the binding force of the registration, as personal service is only necessary on residents having present interests in the land, and not merely a right of action, and as to all others constructive service will bring them in or the two years' limitation will bar them out forever. As to whether the subsequent provisions amount to "due process of law" the court dismisses the question on the authority of Arndt v. Griggs, *supra*. The court says: "In the consideration of this point it must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated and modify the rules of evidence by which the title is to be determined. The true theory of this act is that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed." The court evidently does not think much of the assurance feature and dismisses it with this statement: "In our view of the case the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it."

Massachusetts' attempt in legislating in the Torrens System has been more fortunate from the start than that made in Illinois. This is undoubtedly because it is very much more skillfully drawn than the other. In fact, Justice Wilkin characterizes the Illinois act as a crude and unskillfully drawn piece of legislation. But the Massachusetts act had, of course, to pass the constitutional test, and in this respect also it fared better than the Illinois act, in that it was unconditionally approved in all particulars. The question as to its validity arose in the recent case of Tyler v. Judges, 175 Mass. 71, 55 N. E. Rep. 812, 51 L. R. A. 433, where the court held succinctly, according to the syllabus prepared by the Hon. Geo. F. Tucker, that the act was not unconstitutional on the ground that the original registration deprived any person of any interest in land without due process of law, nor on the ground that it gave judicial powers to the recorder, nor on the ground that there was no provision for notice before registration of transfers or dealings subsequent to the original registration. The opinion of the court has added weight because of the strong argument of that learned and clear-headed jurist, Hon. Oliver Wendell Holmes. In answer to the question as to the sufficiency of substituted service by publication on unknown resident claimants, even though their claims may be perfectly valid, the court does not show the uncertain tread of the Illinois court and deliberately repudiates the reasoning of the Ohio court. In speaking of the provisions for substituted service on unknown defendants, whether resident or not, Justice Holmes says: "If this does not satisfy the constitution, a judicial proceeding to clear titles against all the world is hardly possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims,—indeed, certainly against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the Supreme Court of Ohio that such a judicial proceeding is impossible in this country. State v. Guilbert, 56 Ohio St. 575. But we cannot bring ourselves to doubt that the constitution of the United States and of Massachusetts at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case." This we consider to be the strongest and most unanswerable argument as to the validity of the initial registration of land under the Torrens System that has ever been offered. The court cites in support of its decision the declaration in Hamilton v. Brown, 161 U. S. 256, 274 that it was within the power of the state "to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants and notice by publication to all other persons." Justice Holmes adds: "I doubt whether this court (U. S. Supreme Court) will not take the further step when necessary, and declare the power of the states to do the same thing after notice by publication alone." The court then argues that a proceeding to clear the title to land is one *in rem*, which may be instituted and carried to judgment without personal service upon any claimants whether residents or not. The court's argument in this connection on the distinction between actions *in rem* and *in personan* is one of exceptional force and clearness, and deserves to rank among the greatest judicial utterances in Anglo-Saxon jurisprudence. There is certainly, as Justice Holmes truly remarks, no phrase so much misused and so little understood as a proceeding *in rem*. This argument, however, is not necessary to the decision, as the court holds that the provisions for notice in this act more than fulfill all constitutional requirements. As to the validity of subsequent transfers under the act this court says: "It must be remembered that at all later stages no one can have a claim which does not appear on the face of the registry. The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the legislature from fixing the conditions upon which it shall be held under that system."

The attempt to have this question passed upon by the United States Supreme Court has resulted very unsatisfactorily. In the case of Tyler v. Judges, *supra*, which we have just noticed, the plaintiff sued out a writ of error in the supreme court. Tyler v. Judges, 179 U. S. 405. This tribunal dismissed the writ on the ground that it had no jurisdiction to pass upon the question involved because it did not appear that the plaintiff was personally interested in the litigation or was likely to be deprived of his property without due process of law. Four of the

justices vigorously dissented and it is unfortunate that the other members of the court could not have seen the exceptional propriety and their undoubted authority to assume jurisdiction. In view of Chief Justice Fuller's strong dissenting opinion, in which he is concurred in by Justices Harlan, Brewer and Shiras, the refusal to entertain jurisdiction looks very much like an attempt to shirk a decision of a very difficult question. However, the decision is final and the only possible way to test the question in that court will be some actual case in which a person has been actually deprived of property without due process of law. Considering the fact that under the careful operation of the law as it is now being conducted, such an occurrence will be extremely rare, and the further fact that, even in case of an actual deprivation, the assurance fund offers a more prompt and inexpensive relief than the slow and tedious process of appeal to the supreme court, it may be confidently expected that the constitutionality of these acts in this direction will not be seriously questioned.

JETSAM AND FLOTSAM.

COMPULSORY REGISTRATION OF TITLE UNDER THE TORRENS SYSTEM.

The one apparent defect in American legislation on the Torrens System is the absence of some kind of provision for compulsory registration. Under acts making registration optional a long period necessarily intervenes before the system can be brought well under way. If the system is worth having at all it should be compulsory. Such is the law in England and the German Empire. Under the English act registration of land in any county can be made compulsory, by order in council, in which case no title to land in that county can pass until the buyer is registered as the proprietor of the land. Another method, however, is to require the registration of land by executors or administrators, before land can legally pass from the estate of a deceased person either by devise or descent. It is thought that in populous communities this latter provision is to be preferred for the reason that to compel registration of all land at one time would unreasonably clog the registration office and interfere with alienation. Under the latter method, however, the land of a county would gradually pass from the old system to the new, with the expense borne by those upon whom the burden would be the lightest.

HUMORS OF THE LAW.

In a Georgia case, the judge, giving the opinion, said that "Montgomery, C. J., was providentially prevented from presiding in this case." This may have been a whack at Montgomery, C. J., or at the lawyer who argued it before the weary judge.

The celebrated Lord Brougham had a friend in the profession who was accustomed to preface his examinations with a stereotyped "Now, sir, I am about to put a question to you, and I don't care which way you answer it." This phrase became so hackneyed that it eventually palled on Brougham, who resolved to cure his friend of the habit. Accordingly at their next meeting he accosted him with: "Now, Brown, I am about to put a question to you, and I don't care which way you answer it. How do you do?" Brown took the hint, and Brougham was not annoyed again.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

1. ABATEMENT AND REVIVAL—Death of Ancestor.—A claim on a simple contract debt, for which a man's heirs, as such, are not liable, cannot be revived against them at the death of the ancestor.—Buck v. Hogeboom, Neb., 88 N. W. Rep. 857.

2. ABATEMENT AND REVIVAL.—Right of Survivorship of Several Plaintiffs.—Where one of several plaintiffs in error dies, the right to have an erroneous judgment against all of them reversed attaches to the survivors.—Jameson v. Bartlett, Neb., 88 N. W. Rep. 860.

3. ALIENS—Naturalization.—A law-abiding alien of good moral character is entitled to naturalization, though ignorant of the nature of the institutions of the country.—*Ex parte* Johnson, Miss., 31 South Rep. 208.

4. APPEAL AND ERROR—Absence of Indispensable Party.—An objection that a decree was rendered in the absence of an indispensable party can be raised for the first time on appeal.—Rawls v. Tallahassee Hotel Co., Fla., 31 South. Rep. 237.

5. APPEAL AND ERROR—Denying Motion to Open Default.—The action of a trial court in denying a motion to open a default is not subject to review, unless an abuse of discretion is clearly shown.—Metropolitan St. Ry. Co. v. Davis, U. S. C. C. of App., Second Circuit, 112 Fed. Rep. 633.

6. APPEAL AND ERROR—Fixing Return Day.—Where the law makes it the duty of the trial judge to fix the return day, any error therein is imputable to him, though the order of appeal is prepared by appellant.—Sallee v. Jacquet, La., 31 South. Rep. 153.

7. APPEAL AND ERROR—Granting New Trial.—Where a new trial has been granted on the ground that the verdict is against the weight of evidence, the ruling will not be reversed unless the trial judge abused his discretion or violated some principle of law.—Allen v. Lewis, Fla., 31 South. Rep. 286.

8. APPEAL AND ERROR—Inadequacy of Damages.—Where the evidence in an action for personal injuries is conflicting as to the extent of such injuries, the verdict will not be disturbed on the ground of inadequacy of damages.—Hill v. Alabama & V. Ry. Co., Miss., 31 South. Rep. 198.

9. APPEAL AND ERROR — Incorrectly Indorsing the Name of Pleading.—An omission to correctly indorse the name of a pleading is not prejudicial error.—Norton v. Maddox, Tex., 66 S. W. Rep. 319.

10. APPEAL AND ERROR—Retaxing Costs.—Where appellant moved for retaxation of costs, but appealed, without securing any ruling, no question involved in the same is before the appellate court.—Slagle v. De Gooyer, Iowa, 88 N. W. Rep. 932.

11. APPEAL AND ERROR—Setting Aside Default.—Setting aside an interlocutory judgment by default during the term at which it is entered is a matter resting within the sound discretion of the trial court, and is not subject to review.—Norton v. Maddox, Tex., 66 S. W. Rep. 319.

12. APPEARANCE—Waiving Notice.—Appearance is a waiver of notice.—Kilmer v. Gallaher, Iowa, 88 N. W. Rep. 959.

13. ATTACHMENT—Right of Present Possession. — A person holding a chattel mortgage, with no right to present possession, cannot maintain a claim proceeding for such property as against attaching creditors of the mortgagor.—Barney Cavanaugh Hardware Co. v. Lewis, Fla., 31 South. Rep. 270.

14. BANKRUPTCY — Enjoining Sale of Property on Execution.—A court of bankruptcy will not enjoin a sale of property of a voluntary bankrupt on an execution from a state court levied thereon before the bankruptcy proceedings were instituted.—*In re* Shoemaker, U. S. D. C., W. D. Va., 112 Fed. Rep. 648.

15. BANKRUPTCY—Perjury of Bankrupt as Affecting His Discharge.—Under Bankr. Act, §§ 14, 29, a bankrupt who committed perjury at the first meeting of his creditors should not be discharged, though he could not be convicted of the perjury in a criminal proceeding because of section 7.—*In re* Gaylord, U. S. C. C. of App., Second Circuit, 112 Fed. Rep. 668.

16. BANKRUPTCY — Privileged Communication. — On the examination of a third person, who is an attorney under the bankruptcy act, to ascertain what, if any, interest the bankrupt has in certain property, the court, and not the witness, must determine whether any certain communication between him and his client is privileged.—People's Bank v. Brown, U. S. C. C. of App., Third Circuit, 112 Fed. Rep. 652.

17. BANKRUPTCY — Recovery of Goods.—Clear proof of fraudulent representations, that they were wilfully made, and were the inducement to the sale, is required to entitle a seller to rescind and recover the goods sold after the bankruptcy of the purchaser.—*In re* O'Connor, U. S. D. C, N. D. Ga., 112 Fed. Rep. 666.

18. BANKRUPTCY—Setting Off Amount of New Credits. —Bankr. Act 1898, § 60, cl. c., entitles a creditor who has been innocently preferred to set off the amount of new credits against the preference, which he is required to surrender before proving his claim.—*In re* Thompson, U. S. D. C., E. D. Pa., 112 Fed. Rep. 651.

19. BENEFIT SOCIETIES—Change of Beneficiary.—The beneficiary cannot complain that a change made by assured with assent of the beneficial society was not according to its laws.—Supreme Court Order of Patricians v. Davis, Mich., 88 N. W. Rep. 874.

20. BENEFIT SOCIETIES — Surgical Operation as Affecting Benefits.—A beneficial certificate, not extending to surgical treatment not necessitated by injury, held not to exempt the association from liability for benefits accruing after a surgical operation, necessitated as a means of curing an illness.— Lord v. National Protective Soc., Mich., 88 N. W. Rep. 876.

21. BILLS AND NOTES—Assignment by Indorsement on Mortgage.—Where plaintiff took an assignment of a note by indorsement on the back of the mortgage securing it, and defendant purchased the note in good faith without notice thereof, defendant took the superior title to both the note and the mortgage.—Boyle v. Lybrand, Wis., 88 N. W. Rep. 904.

22. BONDS—Grace. — Under Code, § 3051, providing that negotiable instruments shall be entitled to grace, a debtor is not entitled to grace on a debt evidenced by a bond.—Kilmer v. Gallaher, Iowa, 88 N. W. Rep. 959.

23. BOUNDARIES—Controlling Description in Will by Previous Occupancy.—Where a will, in devising two contiguous lots of land, describes the dimensions, the lines so described cannot be varied or controlled by previous occupancy to a different line.—Krechter v. Grofe, Mo., 66 S. W. Rep. 358.

24. BROKERS — Owner's Right to Determine Consideration.—Where real estate agents for an agreed compensation undertake to find a purchaser satisfactory to the owner, he alone has the right to determine the consideration for which he will sell and the details governing the payment therefor to him.—Kilham v. Wilson, U. S. C. C. of App. Eighth Circuit, 112 Fed. Rep. 565.

25. CARRIERS — Passenger's Action for Injuries in Tort or Contract.—As plaintiff sought to recover for the negligence of defendant railroad company in failing to keep its road in repair, his cause of action was in tort, though he also alleged a contract with defendant to carry him safely as a passenger.—Chesapeake & N. Ry. v. Hanmer, Ky., 66 S. W. Rep. 375.

26. CHATTEL MORTGAGES — Mingling Cattle Under Mortgage. — A chattel mortgage on a certain herd of cattle is not rendered invalid as to an attaching creditor by afterwards commingling the cattle with a herd of similar cattle.—Frick v. Fritz, Iowa, 88 N. W. Rep. 961.

27. CHATTEL MORTGAGES—Priority Over Landlord's Claim for Future Rent.—A purchase-money chattel mortgage, executed by a tenant immediately on acquiring title to the personalty is a prior lien to the landlord's claim for future accruing rent. — Davis Gasoline Engine Works Co. v. McHugh, Iowa, 88 N. W. Rep. 948.

28. CONSPIRACY — Extent of Co-conspirator's Liability.—A conspirator is not criminally liable for every incidental result arising from the acts of co-conspirators, but only for such as could reasonably have been foreseen. — Myers v. State, Fla., 31 South. Rep. 275.

29. CONSTITUTIONAL LAW — Class Legislation.—Pub. Acts 1897, No. 25, § 1, authorizing suit by or against unincorporated voluntary associations, is not invalid as special class legislation directed against organized labor.—United States Heater Co. v. Iron Molders' Union of North America, Mich., 88 N. W. Rep. 889.

30. CONSTITUTIONAL LAW—Validity of Act Validating Tax Sales Prior to Its Passage.—Laws 1901, ch. 105, attempting to validate tax sales made prior to its passage, where there was a failure to give the satisfactory notice of sale, is unconstitutional. — McCord v. Sullivan, Minn., 88 N. W. Rep. 989.

31. CONTRACTS — Acceptance of Part Performance.— Where materials furnished in part performance of a contract are accepted and used, the value thereof may be recovered, less the damages sustained by reason of failure to complete the contract.—McDonough v. Evans Marble Co., U. S. C. C. of App., Sixth Circuit, 112 Fed. Rep. 634.

32. CONTRACTS — Premiums. — Where a sewing machine company agreed to give an agent one machine as a premium in case he sold twelve, he was not entitled, on selling and paying for eleven machines, to retain a twelfth one as a premium. — White Sewing Machine Co. v. Logan, Ark., 66 S. W. Rep. 348.

33. CONTRACTS — Subscription to Church.—Where a subscriber signs a subscription for the erection of a church on agreement that he be paid a sum expended for a temporary chapel, such agreement and payment constitute a binding contract. — Hodges v. O'Brien, Wis., 88 N. W. Rep. 901.

34. CORPORATIONS — Validity of Provision for Arbi-

tration of Differences Between Corporation and Stockholders. — Provision in the charter and by-laws of a corporation that differences between the corporation and its stockholders shall be submitted to arbitration is invalid and non-enforceable. — State v. North American Land & Timber Co., La., 31 South. Rep. 172.

35. COURTS—Determination of Jurisdictional Amount. —In a suit to enjoin the enforcement of an assessment for street improvements, the amount in controversy, for determining whether a federal court has jurisdiction, is the amount of the assessment. — Eachus v. Hartwell, U. S. C. C., S. D. Cal., 112 Fed. Rep. 564.

36. COURTS—Jurisdiction.—The court will decline to exercise jurisdiction, intended to be complete, where it has no power to enforce the determination.—State v. North American Land & Timber Co., La., 31 South. Rep. 172.

37. CREDIT INSURANCE—Renewal Based on False Certificate.—A renewal of a fidelity insurance policy, based on a false certificate of the employer as to having examined the accounts of the employee, who was then a defaulter, held void.—Carstairs v. American Bonding & Trust Co.—U. S. C. C., E. D. Pa., 112 Fed. Rep. 620.

38. CRIMINAL EVIDENCE — Dying Declaration. — A written statement, prepared before deceased believed that he was going to die and signed afterwards, held inadmissible as a dying declaration.—Harper v. State, Miss., 31 South. Rep. 195.

39. CRIMINAL EVIDENCE—Statements of Defendant's Wife.—On prosecution for murder, evidence of statements by defendant's wife, not made in his hearing or presence, held inadmissible.—Millard v. State, Tex., 66 S. W. Rep. 300.

40. CRIMINAL LAW — Aiding and Abetting a Crime.— Where an indictment for murder charged that A inflicted the mortal wound and that B was present aiding and abetting, both may be convicted, though B inflicted the mortal wound and A was present aiding and abetting.—Myers v. State, Fla., 31 South. Rep. 275.

41. CRIMINAL TRIAL—Misconduct of Sheriff.—Misconduct of sheriff in calling to baliff having charge of the jury that, unless they returned a verdict at once, they would be held until the following day, held to warrant a reversal.—Shaw v. State, Miss., 31 South. Rep. 209.

42. CRIMINAL TRIAL — Refusal of Court to Interfere with Illogical Argument of Counsel.—It is not reversible error for the court to refuse to interfere with the argument of the counsel, because illogical or not based on reasonable inferences from the facts.—Mitchell v. State, Fla., 31 South. Rep. 242.

43. CUSTOMS AND USAGES — Architects Schedule of Charges.—An owner not apprised of a schedule of charges obtaining among architects, is not bound by such schedule.—Sully v. Pratt, La., 31 South. Rep. 161.

44. DEEDS — Acceptance.— Where a deed conveying land to a mother and her infant children was delivered to the mother, an acceptance by the children must be presumed; and it was proper to cancel a second deed by the grantor conveying the land to the mother alone.—Hacker v. Hoover, Ky., 66 S. W., Rep. 383.

45. DEPOSITIONS—Failure to File Exceptions.—Objection to depositions upon the ground that they were taken without notice was waived, where no exceptions were filed before the cause was submitted.—Beatty v. Thompson's Admr., Ky., 66 S. W., Rep. 384.

46. DIVORCE—Alimony a Debt.—Alimony or maintenance from a husband is not a debt, within the constitutional prohibition of imprisonment for debt.—Bronk v. State, Fla., 31 South. Rep. 248.

47. DRAINS — Preventing Obstructions. — Where a ditch was a necessity to the lands of plaintiffs, and had been in use for over 30 years, plaintiffs were entitled to a mandatory injunction requiring defendant to remove an obstruction.—Baskett v. Tippin, Ky., 66 S. W. Rep. 374.

48. EJECTMENT — Proving Title. — Plaintiff in ejectment cannot recover as against one without title, unless he proves title or prior possession.—Burt v. Florida Southern Ry. Co., Fla., 31 South. Rep. 265.

49. EMINENT DOMAIN — Costs and Disbursements as Compensation. — A just compensation for property taken in condemnation proceedings includes reasonable costs and disbursements incurred by the property owner in securing ascertainment and payment of such compensation. — Stolze v. Milwaukee & L. W. R. Co., Wis., 88 N. W. Rep. 919.

50. EMINENT DOMAIN — Default in Payment of Compensation.—Where default in payment of compensation, as required by Rev, St. § 1555, is made, a writ of error thereafter sued out by petitioner in condemnation proceedings will be dismissed. — Florida Cent. & P. R. Co. v. Bear, Fla., 31 South. Rep. 287.

51. EMINENT DOMAIN — Railroad's Right to Condemn Right of Way.—Under Rev. St., 3 41, par. 4, and *Id.* § 2158, a railroad corporrtion, organized under the general incorporation laws, has power to condemn land for its right of way along its main line or an extension thereof. — Florida Cent. & P. R. Co. v. Bell, Fla., 31 South. Rep. 259.

52. EMINENT DOMAIN — Right to Restrain Street Railroad.— Where a street railway company, incorporated for transportation of freight, has obta ned the sanction of the municipal authorities, an abutting property owner cannot restrain its use of the street.—Rische v. Texas Transp. Co., Tex., 66 S. W. Rep. 324.

53. EQUITY — General Demurrer. — A general demurrer to a bill will be overruled, where complainant is entitled to any substantial relief thereunder.—Louisville & N. R. Co. v. Gibson, Fla., 31 South. Rep. 230.

54. EVIDENCE — Clerk's Certificate.—A certificate of the clerk of a county court that at a certain time he had indexed a certain judgment record is not competent evidence of such indexing.—Lindsey v. State, Tex., 66 S. W. Rep. 332.

55. EVIDENCE—Judicial Notice. — The court will take judicial notice of who was clerk of the county in which a court is sitting at the time of filing of an abstract of judgment from another county.—Goodwin v. Harrison, Tex., 66 S. W. Rep. 308.

56. EVIDENCE—Pedigree of Animals. — The pedigree of an animal may be proved by reputation. — Jones v. Memphis & A. C. Packet Co., Miss., 31 South. Rep. 201.

57. EVIDENCE—United States Census.—The court will take judicial notice of the published official census of the United States, for the purpose of determining the population of the several counties of the state at a given period.—State v. Evans, Mo., 66 S. W. Rep. 355.

58. EXECUTION — Sale Under Void Judgment.—A purchaser at execution sale under a void judgment is not entitled to enjoin the sale of property under an execution on a valid judgment. — First Nat. Bank v. Greig, Fla., 31 South. Rep. 239.

59. EXECUTORS AND ADMINISTRATORS—Uncollectible Accounts.—Where executors, who are in a position to know the condition of the estate, report certain debts are desperate, the orphans' court has no power, in the absence of evidence showing them to be collectible, to charge the executors with such accounts.—Wrightson v. Tydings, Md., 51 Atl. Rep. 44.

60. FALSE PRETENSES — Reports of Financial Condition to Mercantile Agency. — Discrepencies between report of financial condition furnished to mercantile agency and actual condition will not justify criminal prosecution, unless clearly shown to have been intended to defraud some dealer.—Blum v. State, Md., 51 Atl. Rep. 26.

61. FORGERY — Conviction of "Uttering" an Indictment for Forgery. — Under an indictment charging forgery, no conviction for uttering a forged instrument can be had.—King v. State, Fla., 31 South. Rep. 254.

62. FRAUDULENT CONVEYANCES — Money Given by

Debtor to Wife.—Money given by a debtor to his wife after plaintiff's debt was created still belonged to him, and therefore real estate purchased with the money in the wife's name may be subjected to plaintiff's debt.—Beatty [v. Thompson's Admr., Ky., 66 S. W. Rep. 384.

63. FRAUDULENT CONVEYANCES — Title Under Foreclosure Without Consideration. — Title under foreclosure of mortgage, paid and assigned without consideration to hinder and delay creditors of mortgagor, *held* void against title under sale on execution against the mortgagor. — Milliman v. Eddie, Iowa, 88 N. W. Rep. 964.

64. FRAUDULENT CONVEYANCES — Withholding Deed From Record.—The fact alone that a grantee of land withholds his deed from record for a number of years affords no ground for setting it aside at suit of a judgment creditor of the grantor, whose judgment was not obtained until after it was recorded. — Brown v. Easton, U. S. C. C., N. D. Iowa, 112 Fed. Rep. 592.

65. GUARDIAN AND WARD — Authority of Guardian to Employ Physician.—Guardian held to have authority, without order of court, to contract for the payment of physician's charges from the *corpus* of the ward's estate.—Williams v. Bonner, Miss., 31 South. Rep. 207.

66. HABEAS CORPUS—Erroneous Judgments.—Where a judgment under which a person is held is merely erroneous, but the court had jurisdiction, the party aggrieved can have relief by writ of error or other process of review, but not by *habeas corpus*.—Bronk v. State, Fla., 31 South. Rep. 248.

67. HAWKERS AND PEDDLERS—Agent of Wholesaler. —Agent of wholesale dealer in supplies, making periodical visits to a city and selling and delivering goods to dealers, held not a peddlar. — City of St. Paul v. Briggs, Minn., 88 N. W. Rep. 984.

68. HIGHWAYS — Ownership of Soil in Street.—In the absence of evidence to the contrary, an abutting lot owner is presumed to own the soil to the center of the street.—Rawls v. Tallahassee Hotel Co., Fla., 31 South. Rep. 237.

69. INFANTS — Duty of Pleading Waiver. — Where minors are defendants in a suit to enforce a vendor's lien, they may show waiver without pleading it.—Lucas v. Wade, Fla., 31 South. Rep. 231.

70. INTERNAL REVENUE—Stamp on Sheriff's Certificate on Foreclosure.—It is not necessary to attach an internal revenue stamp to a copy of the sheriff's certificate on foreclosure showing that the appraisers were resident freeholders.—Sanborne v. Lindsey, Neb., 88 N. W. Rep. 869.

71. JUDGMENT—Filing Amended Complaint.—Where plaintiff on demurrer files an amended declaration, a copy thereof must be served on defendant before a default can be entered for failure to plead to such amended declaration.—Southern Ins. Co. of New Orleans v. Smith-Tyler, Fla., 31 South. Rep. 247.

72. JUDGMENT—Res Judicata.—A judgment in an action brought by a real estate agent to recover a contingent fee for finding a purchaser held a bar to a subsequent action in equity for accounting as to such fee.—Kilham v. Wilson, U. S. C. C. of App., Eighth Circuit, 112 Fed. Rep. 565.

73. JUDGMENT—Set Off.—A judgment debtor, obtaining judgment against his creditor after payment of the judgment in favor of the latter to the agent of the latter, cannot have his judgment set off against the sum paid the agent.—Selinas v. Lee, Vt., 51 Atl. Rep. 5.

74. JUDGMENT — Transcript of United States District Court Judgment as Evidence.—Transcript of a judgment of a United States district court, duly certified, is competent evidence, though it fails to show that the presiding judge signed the journal record.—Stacks v. Crawford, Neb., 88 N. W. Rep. 852.

75. JURY — Peremptory Challenges.—After a trial juror is sworn in chief, it is too late to challenge peremptorily.—Myers v. State, Fla., 31 South. Rep. 275.

76. JURY—Qualifications.—Where a juror has formed an opinion, from reading newspapers, as to the crime charged, he may be required to serve, if he declares on oath that he will base his verdict exclusively on the law and the evidence.—Rottman v. State, Neb., 88 N. W. Rep. 857.

77. JUSTICES OF THE PEACE—Trial De Novo on Appeal.—Trial *de novo* on appeal from a justice cannot be had, on subsequent filing *nunc pro tunc* of affidavit required to be filed at time of appeal.—Gruetzmacher v. Wanninger, Wis., 88 N. W. Rep. 929.

78. LANDLORD AND TENANT — Lien.—A waiver by a landlord of the priority of his lien over a mortgage for crop advances given by his tenant held not to inure to the benefit of an assignee of the mortgage.—Neeley v. Phillips, Ark., 66 S. W. Rep. 349.

79. LARCENY—Property of Unknown Owner.—On a prosecution for the theft of cattle belonging to an unknown owner, it is not necessary to prove that prior to the alleged theft the cattle were known as the property of an unknown owner.—Clements v. State, Tex., 66 S. W. Rep. 301.

80. LIBEL AND SLANDER — Charging Illegal Confinement.—A newspaper article, charging that a person is unlawfully received and held a prisoner in the county jail, held libelous *per se*.—Boone v. Herald News Co., Tex., 66 S. W. Rep. 313.

81. LIBEL AND SLANDER—"Thief" as an Actionable Word.—Calling the defendant a "thief" held not a slander *per se*.—Egan v. Semrad, Wis., 88 N. W. Rep. 906.

82. LIFE INSURANCE—Defense Under "Incontestable" Clause.—An incontestable clause in a life policy held not to prevent the company from setting up a partial defense arising from an assignment of the policy under a condition contained therein.—McQuillan v. Mutual Reserve Fund Life Assn., Wis., 88 N. W. Rep. 925.

83. LIFE INSURANCE—Release by Beneficiary.—Release by beneficiary in a life policy of her interest therein under an agreement to change beneficiaries held an equitable assignment of such interest.—Cockrell v. Cockrell, Miss., 31 South. Rep. 203.

84. LIMITATION OF ACTIONS—Changing Prayer of Bill. —The granting of an amendment changing the prayer of a bill from a request to quiet title to a request for a mortgage foreclosure, after limitations had expired against an original foreclosure bill, held not erroneous.—Easter v. Riley, Miss., 31 South. Rep. 210.

85. LIMITATION OF ACTIONS—Tolling by Filing Petition.—The filing of petition and issuing of summons against defendant stopped the running of the statute, though defendant was a non-resident; plaintiff city and its attorney being ignorant of that fact.—Walston v. City of Louisville, Ky., 66 S. W. Rep. 385.

86. MARRIAGE—Alimony on Annulment of Marriage. —Where, in a suit to annul a marriage, both parties admit that no marriage ever existed, alimony cannot be allowed.—Knott v. Knott, N. J., 51 Atl. Rep. 15.

87. MASTER AND SERVANT — Scope of Employment.— Employee of railroad company held not to have been acting outside the scope of his employment, so as to preclude recovery for injury inflicted by his negligence on a fellow-servant.—Jensen v. Omaha & St. L. R. Co., Iowa, 88 N. W. Rep. 952.

88. MORTGAGES—Notice of Foreclosure.—Notice of foreclosure is not invalid because the newspaper, though published in the proper county, was partly printed outside of such county.—Ætna Life Ins. Co. v. Wortasewski, Neb., 88 N. W. Rep. 855.

89. MUNICIPAL CORPORATIONS—Defective Sidewalks. —Under city charter of Fond du Lac, held, that the abutting lot owner was primarily liable for injuries resulting from the mere lack of repair of defective sidewalks.—Devine v. City of Fond du Lac, Wis., 88 N. W. Rep. 913.

90. MUNICIPAL CORPORATIONS—Right of Taxpayer to

Enforce Rights of City.—Where municipal corporation refuses to institute legal proceedings, a taxpayer may be permitted to sue in behalf of himself and others to enforce the right of the city.—*In re* Minneapolis Police Department Relief Assn., Minn., 88 N. W. Rep. 977.

91. MUNICIPAL CORPORATIONS—Taxpayer's Right to Prevent Illegal Contract.—The motive of a taxpayer in instituting a suit to prevent the city from entering into an illegal contract involving the expenditure of municipal funds does not affect his right to maintain such action.—Packard v. Hayes, Md., 51 Atl. Rep. 32.

92. NE EXEAT—When Issued.—A writ of *ne exeat* may be issued by a court of equity in a suit by a wife for maintenance before a decree is rendered fixing the amount to be paid.—Bronk v. State, Fla., 31 South. Rep. 248.

93. PARTNERSHIP—Attaching Individual Property of Non-Resident Partner.—Individual property of a non-resident partner may be attached in suit against the co-partners, and will be subject to a sale under execution under a valid judgment.—First Nat. Bank v. Greig, Fla., 31 South. Rep. 239.

94. PLEADING—Leave to Amend After Motion for Nonsuit.—Leave to amend a declaration in a law action will not be granted after a motion for nonsuit has been argued and the court has pronounced judgment thereon, or is about to do so.—Higgins v. City of Wilmington, Del., 51 Atl. Rep. 1.

95. PLEADING—Liberal Construction of Demurrer.—Where a petition is assailed for the first time at the close of the testimony by a demurrer *ore tenus*, it will be liberally construed.—National Fire Ins. Co. v. Eastern Building & Loan Assn., Neb., 88 N. E. Rep. 863.

96. PRESUMPTION—Where Defendant Does Not Testify.—Where defendant in a civil case can by his own testimony throw light on his defense as to matters within his own knowledge, and does not testify, the presumption is that the facts as he would have them do not exist.—Bastrop v. Levy, La., 31 South. Rep. 164.

97. PRINCIPAL AND AGENT—Presumption of General Agency.—Where authority as general agent is once shown to exist, it will be presumed to continue, unless shown to be revoked.—Cheshire Provident Inst. v. Fuesner, Neb., 88 N. W. Rep. 849.

98. PRISONS — Indeterminate Parole.—The granting of a parole to a convict sentenced for an indeterminate time under Laws 1898, No. 127, held beyond the power of the board of prison commissioners.—*In re* Conditional Discharge of Convicts, Vt., 51 Atl. Rep. 10.

99. PROBATE COURT—Conclusiveness of Decrees.—The judgment of a probate court on the allowance of a claim cannot be attacked on an application to sell lands of the estate to pay debts.—Jackson v. Gorman, Ark., 66 S. W. Rep. 346.

100. PUBLIC LANDS — Cancellation of Patents.—A patent regularly issued by the United States to the assignee of a military bounty land warrant could not be canceled seven years later by the commissioner of the land office without notice or opportunity to be heard.—Long v. Olson, Iowa, 88 N. W. Rep. 933.

101. RAILROADS—Ultra Vires Stipulations.—A railroad company, entering into a stipulation to do a certain act in consideration of a grant in aid thereof, is estopped to set up that the stipulation is *ultra vires*.—Atkins v. Shreveport & R. R. V. Ry. Co., La., 31 South. Rep. 166.

102. RELEASE—By Next of Kin.—A contract whereby the next of kin of an employee released the railroad from all damages that might accrue to the employee by the railroad's negligence is void, as against public policy.—Tarbell v. Rutland R. Co., Vt., 51 Atl. Rep. 6.

103. REPLEVIN — Pursuing Proceeds.—Defendant in replevin may pursue proceeds of sale of property.—Ross v. Morse, Mich., 88 N. W. Rep. 881.

104. SALES—On Approval.—A sale on approval after condition performed by the seller does not become complete until such approval by the buyer, though he is given custody of the goods before that time.—Davis Gasoline Engine Works Co. v. McHugh, Iowa, 88 N. W. Rep. 948.

105. SALES—Purchaser's Lien.—A purchaser's option to accept or reject machinery sent to him under a contract of sale did not give him a lien entitling him to possession.—James Smith Woolen Mach. Co. v. Holden, Vt., 51 Atl. Rep. 2.

106. SET-OFF AND COUNTERCLAIM—Requisites.—A set-off, to be available, must exist in favor of the defendant in the same right in which it is sued.—Lucas v. Wade, Fla., 31 South. Rep. 231.

107. SPECIFIC PERFORMANCE — To Compel Wife to Convey Inchoate Dower.—Where a contract for the sale of land is made by the husband only, a decree for specific performance cannot compel the wife to convey her inchoate dower in the land.—Camden & T. Ry. Co. v. Adams, N. J., 51 Atl. Rep. 24.

108. STATUTES—Repealing by Implication.—A statute is not repealed by implication, unless it appears that there is a positive repugnancy between the first and the latter statute, or that the last was intended to prescribe the only rule which had governed the case provided for.—Florida E. C. Ry. Co. v. Hazel, Fla., 31 South. Rep. 272.

109. STATUTES — Special Legislation.—The provision of the charter of cities of the first class requiring the payment of interest on taxes past due held not void as special legislation.—Walston v. City of Louisville, Ky., 66 S. W. Rep. 385.

110. SUBSCRIPTIONS — Requisite Amount Not Collected.—A subscriber to a building subscription held to have no cause to complain on the ground that the requisite amount was not collected in a reasonable time.—Hodges v. O'Brien, Wis., 88 N. W. Rep. 901.

111. TAXATION—Setting Aside Assessment.—A circuit court has no authority to set aside an assessment because it considers that the board placed the valuation of certain personalty at too high a figure.—Marsh v. Town of Richwood, Wis., 88 N. W. Rep. 916.

112. TAXATION—Solvent Credits.—The solvent credits arising from a mercantile business held taxable as such in years subsequent to that in which the debts upon which they are based were contracted.—Adams v. Clarke, Miss., 31 South. Rep. 216.

113. TAXATION — Standing Trees.—Standing trees, forming part of a plantation on the 1st of January, are included in the taxation of the plantation for that year; and payment of taxes on the plantation carries with it payment of taxes on the trees.—Palfrey v. Connelly, La., 31 South. Rep. 148.

114. TELEGRAPHS AND TELEPHONES—Incorrect Transmission.—Code, § 4326, providing penalty for incorrect transmission of telegram, does not apply to delay in transmission.—Western Union Tel. Co. v. Hall, Miss., 31 South. Rep. 202.

115. TRIAL—Improper Remarks of Trial Judge.—A statement by the court to the jury, emphasizing the cost of the trial to the county, and asking them to struggle with the case until they came to an agreement, held prejudicial.—Hodges v. O'Brien, Wis., 88 N. W. Rep. 901.

116. VENDOR AND PURCHASER—Waiver of Vendor's Lien.—Waiver of a vendor's lien is defensive matter, which defendant must allege and prove.—Lucas v. Wade, Fla., 31 South. Rep. 231.

117. WITNESSES — Competency of Wife.—Objection that a witness was incompetent because her husband was *particeps criminis* cannot be sustained, where the husband was not indicted.—Burns v. State, Tex., 66 S. W. Rep. 303.

118. WITNESSES—Impeachment.—In order to admit proof under Rev. St. § 1102, as to former contradictory statements, they must be inconsistent with the present testimony and relate to material matters.—Myers v. State, Fla., 31 South. Rep. 275.